

In April 2000, the claimant's pain began to increase. In July 2000, he went to see his personal physician, Dr. Ekengren. Dr. Ekengren restricted the claimant to a 40-hour work week and when the claimant presented those restrictions to the respondent they were accommodated.

The administrative file contains an application for post-award medical filed October 12, 2000, requesting medical care for the neck, back, both arms and both hands. The respondent agreed to provide treatment with Dr. Estivo. Dr. Estivo provided physical therapy and also referred the claimant to Dr. Stein to determine if additional surgery was warranted. The claimant felt the physical therapy only worsened his condition.

Claimant's family physician had referred him to Dr. Meister who recommended trigger point blocks and epidural steroid injections for pain control. On January 3, 2001, Dr. Stein prepared a letter which indicated that he did not recommend any further surgical intervention on the claimant's neck. Dr. Stein further noted that the claimant had been seeing Dr. Meister for pain control and it would be reasonable to do the trigger point blocks and steroid injections if the Dr. Meister felt those were appropriate.

On January 16, 2001, the claimant sent the respondent a letter designated as a notice of intent demanding authorization for medical treatment, noting that an application for preliminary hearing would be filed if benefits were not provided within seven days of receipt of the correspondence. The respondent replied authorizing the treatment as outlined in Dr. Stein's report. The respondent further contacted Dr. Meister and authorized the treatment.

Before receipt of the respondent's letter authorizing Dr. Meister to provide the treatment, the claimant sent the respondent a letter demanding a change of treating physician. The respondent replied and by letter provided a list of three physicians, Drs. Jahnke, Poole and Mills, from which the claimant could pick a treating physician.

The claimant did not choose to select one of the three health care providers offered and the matter proceeded to a post-award medical hearing on March 13, 2001. At the conclusion of the hearing, the Administrative Law Judge authorized Dr. Meister for all treatment, tests, and referrals except to rehabilitation hospitals. The Administrative Law Judge additionally awarded claimant's attorney fees in the amount of \$625.

On review, respondent alleges the Administrative Law Judge erred in designating Dr. Meister the authorized treating physician and awarding attorney fees in the amount of \$625. The respondent contends that K.S.A. 44-510h is controlling. That statute mandates if the Administrative Law Judge finds the services of the health care provider furnished by the respondent are unsatisfactory then the respondent shall submit the names of three health care providers from which the employee may select the authorized treating health care provider. The respondent further contends that it is improper to award attorney fees where the respondent complied with every request the claimant made for medical treatment.

The claimant responds noting that Dr. Stein had referred the claimant to Dr. Meister and that once the authorized treating physician refers to another physician, the subsequent physician becomes authorized for all treatment. The claimant notes that when the request was made for the Administrative Law Judge to consider the issue of attorney fees, the respondent did not object and failure to do so constitutes a waiver regarding the amount of the fees.

The evidentiary record reveals that after each of claimant's requests for medical treatment the respondent provided the requested benefits. On October 12, 2000, the claimant filed an application for post-award medical. The respondent complied with the request by authorizing Dr. Estivo to provide treatment. Dr. Estivo prescribed a course of physical therapy and referred the claimant to Dr. Stein for a second opinion regarding additional neck surgery.

While awaiting his appointment with Dr. Estivo, the claimant had sought treatment with Dr. Meister, who had recommended trigger point blocks and epidural steroid injections for pain control. When Dr. Stein's report noted that such treatment would be appropriate, the claimant then sent a letter, designated as a notice of intent, which again demanded medical treatment. The respondent agreed that Dr. Meister could undertake the course of treatment.

Although it is unclear from the record, it appears that before claimant received notification that Dr. Meister would be authorized, claimant sent an additional letter to respondent demanding a change of physician. The respondent replied and provided the claimant a list of three health care providers from which to select the authorized treating doctor.

In summary, the claimant made three demands for post-award medical treatment and the respondent complied with each request. When claimant initially requested post-award medical treatment, the respondent authorized Dr. Estivo to provide treatment. When claimant received Dr. Meister's recommendation for a course of treatment, which Dr. Stein agreed was appropriate, the claimant again demanded medical treatment. The respondent authorized the treatment with Dr. Meister. Lastly, the claimant requested a change of physician and, instead of litigating the issue to determine if the treatment that had been provided was satisfactory, the respondent provided the claimant with a list of three health care providers for selection of an authorized treating health care provider.¹

There is nothing in the record that indicates the respondent was not providing medical treatment. It was premature for the claimant to proceed to hearing on the issue of treatment with Dr. Meister when that treatment regime had been authorized by the respondent but not undertaken by the claimant. The claimant argues that after Dr.

¹See K.S.A. 44-510h(b)(1).

Meister's course of injections was concluded the respondent would deny any additional treatment or referrals by that doctor. This argument is premised on a future course of action which might or might not have occurred and was simply speculative.

In addition, the claimant's request for a change of treating physician resulted in the respondent providing a list of three health care providers from which the claimant could have chosen an authorized treating health care provider. Again, the claimant received exactly what he asked for but apparently because Dr. Meister was not on the list of three the claimant proceeded to hearing.

Dr. Meister was authorized to provide the injections that claimant had requested for pain control. There was no present controversy to adjudicate regarding that course of treatment. The Legislature did not intend for the Act to be used as a vehicle to obtain advisory opinions or declaratory judgments on matters that are not in actual controversy nor ripe for decision.

When the claimant requested a change of treating physician, that raised the issue of the adequacy of the treatment being provided. In the event the Administrative Law Judge determined the services provided were unsatisfactory then the Judge was required by K.S.A. 44-510h(b)(1) to order the respondent to provide a list of three health care providers from which the claimant would select the authorized treating provider. Again, the respondent voluntarily provided the list and there remained no justiciable controversy for the Administrative Law Judge to decide.

The Administrative Law Judge erred in appointing Dr. Meister the authorized treating health care provider and that decision is reversed. The claimant may select the authorized treating health care provider from the list submitted or he may elect to proceed with the treatment which respondent has authorized and provided.

The award of attorney fees is reversed. It is contrary to public policy to assess attorney fees against a respondent who has voluntarily complied with all the requests for additional medical treatment.²

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated March 13, 2001, is reversed.

IT IS SO ORDERED.

²See *May v. University of Kansas*, 25 Kan. App.2d 66, 957 P.2d 1117 (1998).

Dated this _____ day of May 2001.

BOARD MEMBER

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DISSENT

I respectfully disagree with the majority's disposition of this appeal. I do not believe the majority has addressed the issues that were presented in this appeal. I believe the issues are:

(1) Did Dr. Meister become an authorized physician by reason of a referral from an authorized treating physician?

(2) If so, do respondent and insurance carrier have the authority to restrict Dr. Meister's treatment?

(3) If not, what is the appropriate remedy?

By the majority's failure to address the above issues, claimant is without redress.

BOARD MEMBER

pc: Robert R. Lee, Attorney, Wichita, Kansas
Roger E. McClellan, Attorney, Wichita, Kansas
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director